The *Hudud* Controversy in Contemporary Malaysia: A Study of Its Proposed Implementation in Kelantan and Terengganu

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Abstract: Islam is more than a religion, it encompasses faith, culture, law and the social order. Islam proposes a society of righteousness and justice. Criminal behavior is not tolerated in the Islamic order of society. Criminal behavior is breach of God's sovereignty, hence stiffer penalties are prescribed. This paper explores and examines *Hudud* punishments in Islamic penal system, and is specifically purposed to analyse the proposed actualisation of the *Hudud* law in the two Malay-Muslim dominated states of Kelantan and Terengganu in the east coast of Peninsular Malaysia. This paper is legal normative with descriptive-qualitative approach on both primary and secondary resources in order to obtain a judicial view of the subject matter by employing legal-theoretical and comparative analysis. In Malaysia, the Syariah Criminal Enactment (II) 1993 of Kelantan and the Syariah Criminal Enactment 2003 of Terengganu (as proposed by PAS) allow the application of *Hudud* laws into the above mentioned states. However, the enforcement of the above in both these states have been suspended indefinitely as UMNO claims these laws are inconsistent with the Federal Constitution - the supreme law of the Federation. This is because the enactment of penal laws are within the jurisdiction of the federal authority and not the state. Furthermore, the criminal jurisdiction of the Syariah Court has been restricted by the Syariah Courts (Criminal Jurisdiction) Act 1965, a federal law. The arguments in relation to the implementation of *Hudud* laws in Malaysia is an ongoing political-dispute between PAS and UMNO even to the present moment. PAS had proposed and conceived the idea on the actualization of *Hudud* in the states of Kelantan and Terengganu without consultation or input from the federal government. Furthermore, it is submitted that the *Hudud* introduced by these two states were done hastily and more for political gains than for its importance for the need for it. Upon examining the facts related, this paper arrives at a point where it confirms the unsuitability on the actualization of the *Hudud* law presently not only in Kelantan and Terengganu but in contemporary Malaysia as a whole. Nevertheless, if at all the *Hudud* were to be taken as a new model for the judiciary in Malaysia, it has to be re-evaluated and appraised on its limitations as well as to incorporate the Malaysian elements into it; taking the aspect of social make-up of the population and the various cultures that exist alongside the Muslim in order to make it more attuned to a Malaysian society. Equitably, it must be applied to all Muslims and non-Muslims alike.

Keywords: Hudud, Islam, Criminal Law, Punishment, Syariah, Society, Federal Constitution, Federation.

1. Background

First and Foremost, allow me to briefly outline the background on Malaysia's politico-administrative system before we embark on the actual thrust of this paper. This is to ensure that we understand and appreciate beforehand the present political status of Malaysia as a Federation.

In Malaysia, there are matters that lie within the jurisdiction of the Federal Legislature[1] and there are matters that lie under the jurisdiction of the State Legislature.[2] The Constitution is the supreme law of the

[1] Ninth Schedule List I (Federal Constitution)
[2] Ninth Schedule List II (Federal Constitution)

country and any law that is inconsistent with it is null and void.[3] Government powers are shared by the three branches, the Executive, the Legislature and the Judiciary. At the federal level, executive power rests with the cabinet, led by the Prime Minister. The members of the Cabinet consist of members of the Dewan Rakyat elected in the general election. They belong to a coalition of parties that won a majority in the general election. (However, some Ministers are appointed from the appointed members of the Dewan Negara). In the final analysis, the Cabinet and the Government are answerable to the voters who may even remove the Government. The Yang Di-Pertuan Agong acts on the advice of the Cabinet. By convention, he must follow the advice of the Cabinet except in some matters provided for by the Constitution.

Legislative powers are vested in the Parliament consisting of the Dewan Rakyat, the Dewan Negara and the Yang Di-Pertuan Agong. Constitutional amendments require a two-thirds majority. Apart from that, there are matters that require the consent of the Conference of Rulers. Federal Parliament may only legislate on matters prescribed for it by the Constitution. It cannot legislate on matters that lie within the jurisdiction of the State Legislature.

Judicial powers are vested with the courts. These include power to interpret the Constitution and judicial review. Courts are empowered to declare a law, whether made by the federal or the state legislature void if it conflicts with the constitution. The court also has the power to declare and order, directive, decision or action of a Minister invalid through judicial review. This is usually done through an order of certiorari and habeas corpus. No one is above the law.

A State Legislature may only legislate on matters that lie in List II of the Ninth Schedule (State List). Syariah Courts are State Courts. Their jurisdictions are limited to Muslims only.

Since independence in 1957, Malaysia has practiced the legal system based on the present constitution.[4] Hence, we should not simplify matters by saying that our constitution is only a manual of statecraft left by the colonialists that has nothing to do with Islam and thus should be ignored. On the contrary, the promulgation of our constitution has its history. This includes the history of the struggle of the Muslim-Malays who rejected the Malayan Union of 1946 and accepted the tradition of consultation and compromise among the various groups that existed at that time.

It must be admitted that the basis of our legislation is very much influenced by Western legal thought whose roots are not to be found in any of the ethnic or religious groups of this country. Our legal system does not have its origins in the Islamic legal system although Islam is the religion of the indigenous people of this country, nor does it originate from China or India, the countries of origin of the other groups of people of this country. This is to say if there are those who argue that Islamic law is alien to them, then they must also accept the fact the Western law is as alien.

For the Malays, the implementation of Islamic law is nothing new.[5] It has been there for a long time. With the coming of colonialism, most of the practices disappeared. Western liberal thinking which regards

[3] Article 4 (Federal Constitution)

[4] It cannot be claimed that Malaysia's constitution is completely a secular one because in a totally secular system, there is a complete separation of religion and politics. Although Islam is not the main source of all our laws, our constitution does not completely ignore Islam. Islam as the religion of the indigenous people of this country has been given a special status. Since Islam is recognized by the constitution as the religion of the Federation, there is a wider scope for its expansion. This shows that our constitution is accommodating – being a social contract between the various groups, various entities, races and beliefs of the people of this country.

[5] This is due to the legalistic nature of the Islamic religion which has its own regulations. These rules are known as Syariah. The Syariah is not only a set of what is known as Islamic law, but covers a wider system of values and ethics. Syariah is the guiding factor in the development of Islamic civilization. In theory, the Syariah includes all aspects of life, including the personal, family,

religion as an individual matter and has nothing to do with state – influenced our legal system.[6] This process continued even after independence. The implementation of Islamic law is restricted to family administration and certain criminal offences. These laws are administered by a special court known as the Syariah court which has limited authority.

However, political development in Malaysia reveals increasing interest among the Malays who make up the dominant group in the government of this country and who wants to see the teachings of Islam practiced fully. Although this interest existed for a long time, it became more apparent only in the mid-seventies.[7] In Malaysia, there are many obstacles in complying with this demand, but the majority of our political actors still believe in democratic means and let the people decide through the elections. The majority of them still have faith in democracy and will let the people decide as to who should have the mandate to implement the teachings of Islam as required.

J.N.D. Anderson maintains that the legal systems of the Muslim world today can be broadly divided into three groups: (1) those that still consider the syariah as the fundamental law and still practice it to a certain extent in their countries; (2) those that have abandoned the syariah and become secular; and (3) those that have reached some compromise between these two positions.[8]

2. Islamic penal system

The primary objective of Islamic penal system is to protect society from the dangers of crime. Society must be protected from the activities of criminals and hoodlums. Social life must be peaceful and devoid of insecurity. The severity of Islamic penal system is aimed at discouraging criminal behavior. If the criminal knows the anguish and pain he will bring to himself, he/she may abstain from committing the crime. The convicted criminal who has passed through the judicial process once may not willingly dabble into any criminality after the painful experience. Herein lies the philosophy of deterrence in Islamic penal system.

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social and political. In a society where Islamic teachings are practiced, it can be seen how the Syariah determines the worldview, social interactions and the behavior of its members. That is why during the time when Islam exercised great influence on Malay society, many Malay states implemented Islamic law which was a part of the Syariah. This included laws as described in Islam regarding criminal offence such as theft, murder, intoxication and adultery.

[6] Although the existing legal system of this country originated mainly from the West, it has become a part of the life of the people of Malaysia. It acquired legitimacy through overall public acceptance of its regulations. That is why many are of the opinion that any radical effort towards changing the present legal system will face an uphill battle because it has become a part of our multi-racial and multi-religious society. The difficulty in changing the present system to another is due not only to society's reluctance to accept change, but also due to the absence of a dominant ethnic or religious group in the law-making body which is the Parliament.

[7] The rise of the world Islamic renaissance and the many writings about Islam which gave a new lease of life to the teachings of Islam greatly changed the thinking of Malay-Muslims in the country. Demand for the total implementation of Islam in the social and political life is such that it must be given due attention.

[8] J.N.D. Anderson, *Islamic Law in the Modern World*, New York University Press, New York, 1959, p.83. In this context, it can be said that to a large degree the Southeast Asian states that have a Muslim majority – Malaysia, Indonesia, and Brunei Darussalam also apply Islamic Law. After independence, numerous Islamic groups pressured their governments to cease using colonial law and replace it with Islamic law. In Malaysia, the 1957 constitution placed Islam firmly within the state structure while at the same time guaranteeing religious freedom for non-Muslims. See Fred R.Von Der Mehden, 'Malaysia: Islam and Multiethnic Politics,' in John L. Esposito (ed.*), Islam in Asia: Religion, Politics, and Society*, Oxford University Press, New York, 1987, pg. 187. See also G.W Choudhury, *Islam and the Modern Muslim World*, WHS Publications, Kuala Lumpur, 1993, pg. 163-164.

There is a logical argument that Islamic criminal system is due for reforms[9] to fit into the thinking of the 21st century.[10] While fundamentalists are collectively opposed to any reforms, the progressives are pushing their case across the world.[11] Criminal behavior and actions are broadly divided into three categories in Islamic criminal jurisprudence, i.e., *Hudud*, *Qisas* and *Ta'azir*. *Hudud* offences are crimes against God whose punishment is clearly stipulated in the *Qur'an* and the *Sunnah*. *Qisas* is crime involving the taking of life or the causing of bodily harm punishable by retaliation or blood money *Ta'zir* punishments are not prescribed in the Qur'an or Sunnah, and are executed under the discretionary powers of the judge.

This paper, however, confines its discussion to *Hudud* (the plural for *hadd*, meaning "restraint" or "prohibition") which is the capital offences[12] in the Islamic criminal justice system. These are offences that are specified in the *Qur'an* and *Sunnah*. Hudud[13] crimes are often seen as criminal behavior against Allah s.w.t, or public justice. Islamic courts do not have any discretionary power in the execution of *Hudud* penalties. Once a *prima facie* case is established with evidences, and the conditions for applying the punishments are fulfilled, the Islamic court is divested of discretionary powers.

Rebellion against constituted authority either a political leader or economic order is categorized under "corruption on earth", and is punishable by death. The convicted person may be killed through a police, or military action, or through the sentence of a court of competent jurisdiction. Rejection of Islam[14] (apostasy) is a criminal offence in Islamic penal system[15], and the punishment is a death penalty. It can be

[9] Most controversial among these have been the revival of *zina* laws and the creation of new offences that criminalise consensual sexual activity and authorize violence against women. Activists have campaigned against these new laws on human rights grounds; campaigns in countries as diverse as Nigeria, Pakistan and Iran have revealed the injustice and violence brought by the 'Islamisation' of criminal justice systems. The issues addressed in these campaigns resonate in many other Muslim contexts where traditional and patriarchal interpretations of Islam's sacred texts are invoked to limit women's rights and freedoms. See Ziba Mir-Hosseini's article 'Criminalising Sexuality: Zina Laws as Violence Against Women in Muslim Contexts', in *Conectas* Human Rights', International Journal on Human Rights, ISSN 1806-6445, Dec.2011, pg. 7.

[10] In fact, in the early 20th century itself, with the emergence of modern legal systems in the Muslim world, the provisions of classical Islamic law were increasingly confined to personal status issues. However, in the late 20th century, the resurgence of Islam as a political and spiritual force reversed the process. In several states and communities, once-obsolete penal laws were selectively revived, codified and grafted onto the criminal justice system, and, in varying forms and degrees, applied through the machinery of the modern state. See Ziba Mir-Hosseini's article 'Criminalising Sexuality: *Zina* Laws as Violence Against Women in Muslim Contexts', in *Conectas* Human Rights, International Journal on Human Rights, ISSN 1806-6445, Dec.2011, pg. 7.

[11] A great religion like Islam cannot live in the past. Islam cannot ignore all the progress that humanity has made in the past hundred years. The outcome of the agitation for reforms should not be seen as a victory for the progressives. What is needed for the resolution of the impasse is a broad consensus which is the outcome for dialogue. Dialogue between all the contending forces is the only solution to end the isolation of Islam in international community. See article on '*Hudud* Punishments in Islamic Criminal Law', by Dr. Etim E. Okon, Senior Lecturer, Department of Religious Studies, University of Calabar.

[12] To doubt *Hudud* laws and to dispute on its authenticity may nullify one's creed and may fall under the category of those mentioned in the Qur'an, *Surah al-Maidah (5): 44*, "*If any do fail to judge by (the light of) what God Hath revealed, they are (no better than) Unbelievers*." See also Mohammad Shabbir, '*Criminal Law and Justice in Islam*, Petaling Jaya, International Law Book Services, 2002, pg. 232. It is also an explicit and unequivocal teaching for mankind and therefore, binds the Muslims, its non-adherence amounts to a great sin. It calls human beings to the life of virtue, morality, law and order.

[13] *Hudud* crime consists of *zina* (unlawful intercourse), *qadhf* (false accusations of *zina*), drinking intoxicants (*shrub al-khamr*), theft (*sariqa*), robbery (*hiraba*), apostasy (*ridda*), and rebellion (*baqhy*). Punishment for the crime shall be imposed only when the evidence is established beyond reasonable doubt. This is based on the *hadith* of the Prophet Muhammad s.a.w: '*set aside hudud punishments in cases of doubt'*. See 'Implementation of *Hudud* (or limits ordained by Allah s.w.t for serious crimes) in Malaysia', by Ashgar Ali Ali Mohamed, International Journal of Humanities and Social Science, Vol.2 No.3 February 2012.

[14] Prophet Muhammad s.a.w is quoted in one of the Hadith as saying: "*Whoever changes his religion (of Islam) kill him"*. Reported by Bukhari no 2854. The rejection of Islam tends to discourage other people from converting into Islam and that rejection encourages massive criminality and blasphemy with impunity.

[15] The prevailing interpretation of the rejection of Islam in Islamic criminal jurisprudence means that the apostate was only testing Islam without any commitment to it. To that extent, rejection is a deliberate attack and internal rebellion. The apostate is more dangerous than the infidel. Apostasy also means attacking Islam openly and publicly with treachery and blasphemy, which threatens the social and moral fabric of society, and capable of instigating internal revolution that may topple the Islamic State.

imposed against a Muslim[16] who denies the existence of God or angels, or any of the prophets of Islam, or rejecting any section of the Qur'an.

Subsequently, I would like to explain the punishment for *Hudud* crimes, namely fornication, adultery, theft (*saraq*) and drinking of alcohol (*shrub al-khamr*). Fornication means sexual intercourse outside marriage, and the punishment in the Qur'an is 100 lashes.[17] The punishment of flogging is ordered in the Qur'an, Surah 24.2 "*The woman and the man guilty for fornication flog each of them with a hundred lashes and let not compassion move you in their case in a matter prescribed by Allah s.w.t".*

Adultery[18] means extra-marital sex. Prophet Muhammad s.a.w prescribed stoning to death for people convicted of adultery. Islamic criminal jurisprudence stipulates two conditions that must be met before the judgment is executed. The first is that there must be confession by four eye witnesses; it must be a voluntary confession without any element of duress. The sentence can only be executed if it has been repeated four times, at different court sessions. Secondly, it is the duty of the court to establish the fact through examination of all confessions that there was actual penetration of the male's penis into the female's vagina. Islamic law insists that the four eye witnesses must confirm physical observation of the actual intercourse directly.

In this respect, adultery and fornication are called *zina*.[19] False accusations of charges of *zina* is punishable for the offence of defamation (*qadhf*). Defamation threatens the legitimacy of a women's child, the Qur'an prescribes eighty lashes for a free citizen and forty lashes for a slave.[20] Public flogging is meant to protect the honour, dignity and credibility of the innocent.[21]
The crime of theft is explicitly condemned in Islamic penal system. Theft is defined as 'stealing someone else's property. Conditions to establish the crime of theft is also given. The thief must be a matured person and the act of stealing must be intensive and deliberate. The thief must be aware that the property belongs to someone else. The property must have been kept in a secured place which the thief has forcefully broken.[22] The punishment for theft is stated in the Qur'an as follows: "As to the thief, male or female, cut off his/her hands".[23] Amputation of the hands is based on strict conditions. The value of the stolen item must be considered, to determine whether it is in the public interest to prosecute the case. The

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See Abdul Rahman *al-Sheha,* 1998, "Human Rights in Islam and Common Misconceptions, Islamabad, Islam Books, pg. 130-135).

[16] The convicted apostate is given three days of grace to return to Islam. Competent Islamic scholars will educate him on the enormity of the crime he has committed against his own soul, his family and community. If the convicted person decides to return to the Islamic community, he will be set free. Execution of the apostate is a big relief for the larger society who are collectively protected from the maliciousness and violence which disbelief and blasphemy can bring to society.

[17] *"Men are strip to the waist, women have their clothes bound tightly, and flogging is carried out with a leather strip"* (Schmalleger 2001: 632).

[18] The social implications of adultery are obvious, it has given rise to teen pregnancies, broken homes, distrust, divorce and baby dumping, fast spread of AIDS and other venereal diseases, among others. The Prophet Muhammad s.aw said 'When promiscuous behavior becomes rampant in a nation, Allah s.w.t. will send upon them such (strange) diseases that their own ancestors never heard of'. See http://www.islamonline.net/sevlet/Satellite?Pagename=IslamOnline-English-Ask_Scholar/FatwaE/FatwaE&cid=1119503548032#ixzz108Mdf7qb).

[19] Due to its serious social repercussion, Islam has forbidden these acts to the extent of saying that even by looking at the opposite sex with desire, the eyes commit *zina*. The lustful looks at a person of the opposite sex is considered as 'the *zina* (adultery or fornication) of the eye' (Sahih Bukhari).

[20] *"And those who cast it up on women in wedlock, and bring not four witnesses scourge them with eighty stripes"* (Surah 24:4).

[21] The reasoning in Islamic criminal system is that there is a room for retaliation if the accused is not punished. From that time, the confession of that person will not be accepted because the court has taken judicial notice of that person as a confirmed liar.

[22] Islamic jurists viewed the crime of theft in line with the modern principle of manifest criminality which in the words of George Fletcher "the commission of the crime be objectively discernible at the time that it occurred. Manifest criminality is based on the idea that the objectionable act is punishable."

[23] Surah 5:38

minimum value (*nisab*) for the stolen good[24] in Islamic criminal law must be at least a quarter of a dinar, or the equivalent. The stealing of government property is not punishable by amputation. Since the Islamic State has the duty to provide for the citizens, amputation cannot be carried out in a time of famine and starvation. On the procedure and sequence of punishment for the offence, the thief's right hand is cut off at the wrist, and the wound cauterized with boiling oil.

Prophet Muhammad s.a.w once described the offence of drinking alcohol as "the mother of all vices" (*ummal-Khaba'ith*), because alcoholic intoxication can lead to the commission of other offences. The punishment for alcoholism and public intoxication from the *Hadith* is 80 lashes. This punishment was not provided for in the Qur'an.

Equipped with the knowledge on the Hudud offences and the punishment prescribed,[25] we shall now closely examine the proposed implementation of Hudud in both Kelantan and Terengganu by PAS.[26] Prior to that, I would like to emphasize beforehand, that attention must be paid to the provisions of the Federal Constitution regarding the division of legislative powers between the Federation and the States. Under List 1 (Federal List), Ninth Schedule of the Federal Constitution, "criminal law" is a Federal matter[27] and within the jurisdiction of the Civil Courts. On the other hand, "*offences relating to the precepts of Islam*" as provided in List II (State List), Ninth Schedule of the Federal Constitution are within the legislative powers of the States and the jurisdiction of the Syariah Courts.

As regards the offences, we will find that some of the offences are "criminal law" offences which had existed in the Penal Code since 1936 and were in force at the time the Constitution was drafted. Certainly the words "criminal law" used by the framers of the Constitution refer mainly to the offences in the Penal Code. On the other hand, among the offences, there are offences which are not to be found in the Penal Code or any Federal law. In fact, they have been provided for in the Syariah Criminal Offences Enactments of the States. [28]

Hence, if those criminal offences under the Penal Code were to be made punishable with *Hudud* punishments, that could only be done under a Federal law, i.e. as criminal law and not as "offences relating to precepts of Islam" as provided by List II (State List), Ninth Schedule of the Federal Constitution. There is no constitutional impediment to do so as a Federal law. Parliament may choose whatever punishments to be provided for criminal offences, including pinishments according to Syariah. Done that way, they may be extended to Muslims and non-Muslims alike. Criminal law is under the jurisdiction of the Civil Courts. Civil Courts have jurisdiction over Muslims and non-Muslims alike. For

[24] The stolen good must not be *bona vacantia*, i.e. ownerless, or unclaimed property. The property must have been kept in a secured safekeeping (*hizr)*.

[25] It is submitted that the severity of *Hudud* punishment is to serve as a prevention and deterrence from committing these crimes in the first place. The imposition of the punishment is to bring about ultimate order of human civilization and happiness in the society. What *Hudud* brings is peace and order and disciplined behavior as people would not dare to lift a finger to do an evil deed as they know the punishment that awaits them is severe.

[26] PAS leaders have said that setting up an Islamic state and enforcing *Hudud* were the party's religious obligation and, therefore not negotiable. Implementing *Hudud* is the only way to curb crime and social ills.

[27] It must be stressed here that as a Federal criminal law, it must apply to all, Muslims and non-Muslims alike, because it is "criminal law" and not "offences relating to precepts of Islam" as provided by List II (State List), Ninth Schedule of the Federal Constitution. If it is made applicable to Muslims only, it would be contrary to Article 8 as it is a discrimination on ground only of religion and therefore, unconstitutional, null and void. Please refer to Article 8(2): "*Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law…"*

[28] Examples are sexual intercourse out of wedlock, accusing another person of committing zina and offences relating to intoxicating drink. It could be argued that those offences are not part of Federal "criminal law".

Parliament to make such law, no amendment to the Constitution is required and the bill could be passed by a simple majority.

The subsequent question which arises is what about offences which are not to be found in the Penal Code or any other Federal law which, in fact, had already been provided for in the Syariah Criminal Offences Enactments of the States, e.g., adultery? It could be argued that they are not "criminal law". They may be made offences under the State law. However, to use the *Hudud* punishment for them, there is a legal impediment, not by the Constitution but by Federal law[29] which limits the punishments which could be legislated by the State Legislature. Only if the Federal Parliament is prepared to amend the Syariah Courts (Criminal Jurisdiction) Act 1965 to enable the State Legislature to provide for the *Hudud* punishments, then the State Legislature may be able to do so. As a State law under List II (State List), Ninth Schedule of the Federal Constitution, the law is only applicable to Muslims and fall under the jurisdiction of the Syariah courts.

However, if it is done this way, then there will be a situation where some *Hudud* offences carrying Hudud punishments which form part of the Federal criminal law applicable to Muslims and non-Muslims and tried by the Civil Courts. Besides, there will be some *Hudud* offences carrying *Hudud* punishments which form part of the State law [30]applicable only to Muslims and tried by the Syariah Courts. Is it sensible to have such a situation?

It has been widely believed that the law would be made applicable to Muslims only. This is only partially right. The reasons are, first, criminal law is not personal law or "offences relating to precepts of Islam" as provided by List II (State List), Ninth Schedule of the Federal Constitution. Criminal law is a public law. The offences are offences against the State, not just against the victim. That is why it is the Public Prosecutor who prosecutes, on behalf of the State. Secondly, a law applying *Hudud* punishments for criminal offences under the Federal jurisdiction to Muslims only would be inconsistent with Article 8 of the Federal Constitution as it is a discrimination on ground only of religion and therefore, unconstitutional, null and void.[31] Thirdly, is it fair that if a Muslim steals the property of a non-Muslim he is subject to *Hudud* punishment, while if a non-Muslim steals the property of a Muslim he is only subject to imprisonment and/or fine? To implement the Hudud punishments in respect of those offences to Muslim only is not only unconstitutional but also unfair and unwise.

3. Hudud in Kelantan

Ever since its ratification in November 1993 by the State Legislature of Kelantan,[32] the *Hudud* Bill has been the focus of public debate in Malaysia.[33] When the state legislature unanimously passed the Bill, the

[29] See Syariah Courts (Criminal Jurisdiction) Act 1965.

[30] There is a tendency to believe that since the offences are *Hudud* offences, according to Syariah and "Islamic law" is under the jurisdiction of the State, therefore State Legislature may make such law. At the most, they are partially right. In Malaysia, any law made must be consistent with the Constitution. Some of those offences lie within Federal and Civil Courts' jurisdiction. If they are made State law, clearly they are unconstitutional, null and void. Even if it is done by the State Legislature, it cannot be made applicable to non-Muslims. The reason is that the Constitution only empowers the State Legislature to make laws to create offences applicable only to Muslims. Hence, if the State Legislature makes such law applicable to non-Muslims, the law is unconstitutional, null and void. Besides, Syariah Courts have no jurisdiction over non-Muslims. If the State Legislature were to empower the Syariah Courts to try non-Muslims, that law is also unconstitutional, null and void.

[31] Article 8 (2) Except as expressly authorized by this Constitution, there shall be no discrimination against citizens on the ground only of religion, race, descent, place of birth or gender in any law…

[32] The proposal generated a lot of controversy because it worried certain groups of people who questioned the consequences of the implementation of such law. At the same time there are groups who want the law to be implemented without delay. Also, there have been criticisms about the proposal that have irritated certain quarters.

Menteri Besar of Kelantan made it clear that the Bill "*could not be implemented until the Federal Government of Malaysia made changes to the Federal Constitution*".[34] This was evidently an acknowledgement on the part of the State Government that by passing the *Hudud* Bill, the state legislature had exceeded its jurisdiction under the Federal Constitution. The State Government also announced that the Bill "*was prepared by a committee and reviewed and approved by the State Islamic Religious Council and the state Mufti after considering it from all aspects of the Islamic Syariah*".[35] The Kelantan Menteri Besar also went on record to add that by enacting the Bill, the State government was "*performing a duty required by Islam" and failure to act in this regard "would be a great sin*".[36] As to the question whether the people had accepted the State Government's plan to implement the *Hudud* laws, the Timbalan Menteri Besar (Abdul Halim) at this time, made the remarkable announcement that "the question did not arise as Muslims in the State who rejected the laws would be considered *murtad* (apostate)."

In its section on theft (*sariqa*) the Bill penalizes the first offence of theft, when it fulfils all the prescribed conditions (15 such conditions provided under Clause Seven) – with amputation of the right hand from the wrist, and the second offence with amputation of the left foot (in the middle in such a way that the heel may still be usable for walking and standing). The third and subsequent offences of theft are punishable with imprisonment for such terms as in the opinion of the court are "likely to lead to repentance" (Clauses 6 and 52).

The punishment for highway robbery is death and crucifixion if the robbery is accompanied by killing; and it is death only if the victim is killed but no property is taken away. In the event where the robber only takes the property without killing or injuring his victim the punishment is amputation of the right hand and the left foot (Clause 9).

Zina is punishable upon conviction by stoning (with stones of medium size) to death for a married person (i.e., *muhsan*) and whipping of 100 lashes plus one year imprisonment for the unmarried. Four eye-witnesses will be required to prove the act of *zina*. Each witness must be an adult male Muslim of just character. Witnesses shall be deemed to be just until the contrary is proven. The Bill also states that pregnancy on the part of an unmarried woman or when she delivers a child shall be evidence of *zina* which would make her liable to the prescribed punishment (Clauses 1, 41 and 46).

Qadhf a slanderous accusation of *zina* which the accuser is unable to prove by four witnesses carries 80 lashes of the whip, and punishment for drinking liquor based on the oral testimony of two persons is whipping of not more than 80 lashes but not less than 40 (Clauses 13 and 22).

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[33] PAS has offered ten (10) reasons to persuade Malaysians to accept *Hudud*: (1) Hudud laws are God's laws and this is stated in the Quran. Muslims must therefore implement and abide by such laws for the betterment of mankind; (2) Muslims have no choice but to accept *Hudud*. They cannot pick and choose what they consider reasonable or sensible in Islam and leave out the rest; (3) Man-made laws have loopholes and are not to be relied and hence why rely on such laws which are imperfect when God provides us with His laws; (4) Crimes in all forms are becoming more serious and the prisons are overcrowded and a heavy burden on the State. Under *Hudud*, these problems will be reduced considerably because once an individual is tried, convicted and punished, he/she is released. *Hudud* laws are problematic in some countries because individuals abuse the laws; (5) Those who question the laws are not necessarily bad Muslims, they are merely ill-informed. They are influenced by the liberal and immoral West, and are swayed by the belief that everything must be logical. For such people, *Hudud* laws should be rejected because the West regards punishments for such laws to be barbaric; (6) Those who reject the laws are apostates; (7) *Hudud* laws are only meant only for Muslims; (8) *Hudud* will make everyone safe. The reason why investors are not coming to Kelantan has nothing to do with *Hudud* laws, they are actually prevented from investing in the State by the Federal Government; (9) In time, non-Muslims will see the value of implementing *Hudud* laws because they protect the public, prevent crimes and provide just punishments for convicted persons. Under the administration of Hudud, reform programs will be made available for offenders; and (10*) Hudud* laws should be implemented even though the majority of people do not understand the laws.

[34] *New Straits Times*, 25 November 1993, p.8

[35] *New Straits Times,* 25 November 1993, p.8

[36] *New Straits Times,* 25 November 1993, p.8

A Muslim (adult and sane) who is accused of apostasy is required to repent within three days and failure to do so makes him or her liable to the punishment of death as well as the forfeiture of his or her property. The offender will be free of the death sentence, even if it has been passed, if he or she repents; the property will be returned but the defendant would still be liable to imprisonment "not exceeding five years" (Clause 23).

The Bill provides for the establishment of a Special Syari'a Trial Court consisting of three judges, two of whom shall be ulama', and a Special Syariah Court of Appeal, consisting of five judges, including three ulama'. These courts are to be in addition to the Syariah courts that normally operate in Kelantan. All sentences can be appealed against and sentences are enforceable, in the case of had offences, only when confirmed by the special Appeal Court (Clause 49).[37]

The most explicit response at this time came from the Prime Minister then, Tun Dr. Mahathir Mohamad who said on September 1994 that "*the Government would not sit back and allow PAS to commit cruel acts against the people in Kelantan, including chopping off the hands of criminals*". Tun Dr. Mahathir Mohamad added that the PAS version of the Hudud Law "*punishes victims while actual criminals were often let off with minimum punishment. For instance, he clarified that if two people, a Muslim and a non-Muslim, committed a crime, the Muslim offender will be punished severely like having his hands chopped off while the non-Muslim offender will escape with a light sentence like a fine or a month's imprisonment*". He also added that the Government was convinced that "*the law passed by the Kelantan State Assembly in November1993 was against the teachings of Islam*", adding that the punishment meted out must be fair. However, according to what he claimed, were PAS laws, criminals are let off and the victim is punished and this is "*against the true teachings of Islam*" and should therefore be rejected. Tun Dr. Mahathir further reiterated that PAS "*was only interested in gaining political mileage*" by using the issue in view of the upcoming general election at that time and that PAS leaders were aware of this and would continue to harp on the issue. He declared that "*the Government would take action against the PAS-led Kelantan Government if it implemented the PAS-created Hudud laws*". The proposed law could not be enforced because it was not in line with the Federal Constitution. The Federal Government cannot allow the PAS Government to enforce the laws which were against the Islamic spirit of justice.[38]

The Syariah and *Hudud* Laws Committee at the Malaysian Bar Council announced in early October 1994 that the *Hudud* Bill was consistent with Islamic law, but that there was *"inconsistency in certain provisions between Hudud laws and the Federal Constitution which can be overcome by amending the constitution*".[39] Following this, the State Government of Kelantan renewed its call and urged the Federal Government to review its decision over rejecting the *Hudud* Bill.[40]

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[37] Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia', Arab Law Quarterly (1998), pg. 205-206.

[38] *New Straits Times*, Kuala Lumpur, 10 September 1994, p.1-2.

[39] Prof. Ahmad Ibrahim made this observation that to enable the Shariah Courts to deal with cases of *Hudud*, *Qisas* and *Diyat*, it will be necessary to amend the 9th Schedule, List 2 of the Constitution and repeal the Shari'a Courts (Criminal Jurisdiction) Act. He also wrote that another possibility would be for the Federal Government *"to enact the Hudud, Qisas, Diyat and Takzir laws for the purpose of uniformity of laws between the states*". He also maintained that it would not be easy to do this "*considering the difficulties and problems arising from the Federal Constitution and the present laws in Malaysia'*. See Ahmad M. Ibrahim, "*Suitability of the Islamic Punishments in Malaysia,*" (1993) 3 IIUM Law Journal 1, pg.14.

[40] *New Straits Times*, Kuala Lumpur, 2 October 1994, p.6.

4. Hudud in Terengganu

In 2002 Terengganu joined Kelantan in passing the Syariah Criminal Offences (*Hudud* and *Qisas*) Enactment 2002. Civil society groups voiced strong concern and opposition to the blatant discrimination and non-conformity of the enactment to the constitution and internationally accepted standards and norms. These groups also questioned the appropriateness and desirability of such laws in a multi-cultural, multi-ethnic and multi-religious country. The provisions of the *Hudud* laws raise a number of serious concerns, including jurisdictional issues since some of the stated offences overlap with federal criminal laws.

The enactment outlines what it terms *Hudud* punishment for the crimes of theft (*sariqah*), robbery (*hirabah*) and sodomy (*liwat*); it also criminalises illicit sex (*zina*), slanderous accusations of *zina* which cannot be proved by four witnesses (*qazaf*) and consumption of alcohol or intoxicating drinks (*syurb*). The enactment also criminalises the renunciation of Islam. Muslims who want to renounce the religion can be charged for *irtidad* or *riddah* (apostasy).

The *Hudud* enactment also provides for capital and corporal punishment: death by stoning or zina committed by married persons, death plus crucifixion for armed robbery which results in the death of the victim and death for apostasy. Those found guilty of theft would have their right hand amputated for the first offence, their left foot amputated for the second offence and face a jail term, deemed fit by the court, for the third offence. Whippings feature as punishment for many offences, notably *qazaf, syurb* and *zina* committed by unmarried persons. The punishment for sodomy is similar to that for *zina*.[41]

In the final bill that was passed, the scope covers all Muslims in Terengganu and was further extended to cover non-Muslims who elect to be tried under these laws. In a talk in July 2002, PAS acting leader and Chief Minister of Terengganu at that time, Abdul Hadi Awang said that the victims of the crime could also elect for the crime to be tried under *Hudud* laws even if he accused is a non-Muslim. The state government had also announced that after the passing of the bill in the state assembly, in time, once non-Muslims understood and were fully informed of the laws, it would be extended to cover them. In September 2002, former Lord President and Chairperson of the Terengganu Hisbah and Special Committee Salleh Abas said that *Hudud* laws would not be applicable to non-Muslims unless they specifically wanted them to be. He further added that non-Muslims could still present their case under syariah laws if both the complainant and defendant agreed to the arrangement.

There are several areas of grave concerns with regard to the evidentiary requirements of the *Hudud* laws that defy international standards of human rights as well as the constitution. *Zina* is defined as intercourse between a man and a woman outside the institution of marriage, with no distinction made as to whether or not there is consent. In order for there to be a conviction of *zina* (whether for consensual sex or rape) there is the astonishingly stringent requirement for the complainant to provide four "just" male Muslim witnesses, 18 years of age and above, who witnessed the "actual" act of penetration." A complainant who fails to do this stands guilty of *qazaf*, i.e., slanderous accusations, which carries a sentence of 80 lashes. What this means for a victim of rape is the following: (I) She is victimised three times; not only must she live through the trauma of the rape and the ordeal of proving her innocence by having to produce four "just" male Muslim who witnessed the rape, but if she cannot do so she is guilty of *qazaf* and subject to being lashed 80 times. This of course leads to the silencing of rape victims and witnesses for fear of being accused in return. These laws presume the outmoded slogan "women cry rape" and place a high burden of proof on women and are designed to prevent "frivoulos" accusations against men. (II) Pregnancy of an

[41] Freedom of Religion, Hudud and Related Matters in Malaysia: Human Rights Report 2002 Civil and Political Rights, SUARAM Komunikasi, Selangor, Malaysia, 2003, pg. 117.

unmarried woman whose husband is away is also considered proof of *zina*. Even more outrageously, rape victims who become pregnant as a result of the rape and cannot produce the required four male witnesses to substantiate their complaint are guilty of both *zina* and *qazaf*. Pregnancy as proof of *zina* clearly singles out and targets women while the men involved, if they are charged at all, invariably escape punishment. (III) The golden thread of the presumption of innocence that runs through the constitution and the law is severely diminished, with the burden of proof being placed on women to prove their innocence of charges of *zina* when in fact they are victims of a violent crime.[42]

Due to strong objections by civil society groups regarding the unreasonable burden of proof required by the laws, amendments were made to the bill to allow for *qarinah* (circumstantial evidence) to support a claim of rape if the victim is unable to provide the required witnesses. However, these amendments have done little to address the glaring violations against women.

This circumstantial evidence for rape is not sufficient to convict the accused to the level of hudud punishment but only to *takzir* (punishment at the judge's discretion). This relies heavily on the judges' gender sensitivity and understanding of rape. Without sufficient circumstantial evidence to prove that there was forceful intercourse, the rape victim would still be guilty of *qazaf* and likewise would be exonerated if there is sufficient evidence to the contrary. It is widely documented that not all rapes are accompanied by forceful intercourse, as a victim may "comply" or not resist in threatening circumstances. In cases of incest, levels of "compliance" are very high and there may be very few, if any, signs of force.
The amendments also added eight exceptions to the offence of *zina* for which hudud punishment would not be carried out. The circumstances are: (1) the offender marries the victim; (2) there is "improper" penetration; (3) the hymen of a virgin is "intact"; (4) *zina* is committed against the woman's will, or by force, by black magic or by use of drugs or drinks. These exceptions cannot camouflage the fixation with sex by these inward-looking and patriarchal laws. The way sex-related offences are perceived perpetuates the ludicrous notion that an offender of *zina* (or rape) should or might want to marry the other party and the equally ridiculous idea that the hymen is the barometer of chastity and virtue.

The provisions for witnesses' testimonies are also of great concern, not only in that they violate Article 8(2) of the constitution, which stipulates that there should be equality and no discrimination on the grounds of religion, race or gender and also requires an unreasonable high level of standard of testimony.
The *Hudud* enactment explicitly accepts only testimonies from witnesses who are "just" male Muslims. A person shall be considered just if he does what is required by Islam and avoids committing great sins and does not continuously commit lesser sins and further has a sense of honour." There is a presumption that a person is "just" until the contrary is proven. The actual scope and quality of the testimonies of Muslim women and non-Muslims are not provided for in the enactment, although PAS leaders have gone on to say that in "special" circumstances their testimonies would be accepted. The testimonies of these non-male Muslims, if accepted, are likely to be thought of as carrying less weight than that of a male Muslim, as otherwise the explicit provisions in the *Hudud* enactment would be redundant or useless.

Witnesses as well as complainants of zina (and rape) can be guilty of *qazaf*. The testimonies of the witnesses must be clear, unequivocal and not contradict each other. If one witness refuses to testify, gives exculpatory evidence or withdraws an incriminating testimony, the witnesses that have testified positively shall be deemed to have committed *qazaf*. Similarly the complainant (including victims of rape who have no circumstantial evidence) will also be deemed to have committed *qazaf* if there is a failure of conviction. This means that not only do instances of rape without witnesses never come to court, but even

[42] Freedom of Religion, *Hudud* and Related Matters in Malaysia, pg. 119.

if there are witnesses, it is highly unlikely that they will come forward for fear that if their testimonies are not sufficient to convict, they themselves will end up being punished.[43]

For other offences besides *zina*, for example *sariqah* (theft) or *hirabah* (robbery), in order to convict, the crime must be witnessed by at least two "just" male Muslims and their testimonies must be clear, unequivocal and not contradictory. The court must be convinced of the guilt of an accused person 100 percent and there must not remain any shred of doubt.

It is common knowledge that, barring exceptional circumstances, crimes are not committed in full view of the public. With such heavy burdens of proof falling on the victims of crimes, it is likely that, under *Hudud* laws, offences such as rape and theft, except on unusual circumstances, will go unpunished.
The actual enforcement of the *Hudud* laws has been fraught with difficulties, with objections coming from various quarters: the central government, opposition parties, non-Islamic religious groups and the public.

The constitution states that laws of a criminal nature fall within the purview of the federal government. On the other hand, the constitution also states that Islamic legal matters come under the jurisdiction of the state government, hence the argument by the Terengganu State government and the state assembly is competent to legislate on such matters. The central government has persistently said that it will challenge the legality and implementation of the laws. Zaid Ibrahim, a private citizen and lawyer at this time, has initiated legal action to challenge the constitutionality of the *Hudud* enactment, but the matter has yet to be heard.

The Terengganu state police has also refused to extend their cooperation in the enforcement of the *Hudud* laws. To date, no one has been arrested or charged under these laws. Hadi Awang, PAS's acting leader and Chief Minister of Terengganu, has gone on to say that the police are not needed to enforce the *Hudud* as it is the task of the State Religious Department. He said the Islamic laws would create "willingness for offenders to surrender," as Muslims believe that punishment under Islamic laws will cleanse them of their sins. In December 2002, Hadi Awang said that the state government had appointed 274 volunteer syariah enforcement officers.

In August 2002, Chairman of the Terengganu Education, Religious and Syariah Implementation Committee Harun Taib said that the state government would build lockups if the federal government refused to cooperate and detain offenders in existing prisons. He added that they were in the midst of identifying suitable locations. Deputy Prime Minister at this time, Abdullah Badawi replied that the Terengganu government cannot lawfully build prisons, as it does not have the authority pertaining to criminal law and punishment. Meanwhile, Harun Taib in the December 2002 sitting of the state assembly further said that the *Hudud* enactment would be implemented, although no deadline was set. He added that the state government was waiting for a "suitable" time to gazette the laws, after which implementation would take place. This "suitable" time, however, remains unknown, as Hadi Awang has gone to say that the state government has no plans to implement the *Hudud* enactment in the near future. The state government will instead send delegates to Saudi Arabia, Iran and Sudan to study the implementation of the *Hudud* laws in those countries and provide state leaders with a "better idea" as to how to implement them. According to Hadi Awang, the state government had appointed officials with "deep knowledge about Islamic laws" to implement the *Hudud* enactment, but they needed "more exposure and observation" of the experiences of the other countries. This change of plan after the initial desire to push through the *Hudud* laws without timelines and necessary mechanisms or implementation

[43] Freedom of Religion, *Hudud* and Related Matters in Malaysia, pg.120.

raises questions as to whether there was a severe lack of foresight or whether the whole *Hudud* issue was one of political expediency.[44]

5. Conclusion

It is my view that, any law, no matter how good it is, if it is implemented without proper preparation, without taking into account the relevant factors or implemented inefficiently or unprofessionally, may lead to injustice.[45] Good intention alone is not enough. Technical knowhow, expertise and discipline are amongst the factors essential for the success of the implementation. It is important that we take into cognizance the fact that the implementation of a law does not end with bringing it to force. What is more important is how it is done, what are the effects and the consequences, whether it leads to a better society, peace and tranquility and whether it improves the level of peace and justice in the country.

The goal of criminal law is not to punish, including with any particular punishment. The goal of criminal law is to prevent the prohibited acts, to establish public order and to administer justice in the event of contravention. Punishment is a tool to achieve that goal. A tool is not a goal. So, how it is used should be taken into account. The result will be the measure of its success or otherwise. Success of the implementation of the *Hudud* should not be measured merely by the fact that it is implemented or how many heads are decapitated, how many persons are stoned to death and how many hands are amputated.
The non-enforcement of the *Hudud* enactment in Terengganu is reminiscent of the situation in Kelantan, where after the *Hudud* bill was passed and assent given by the Sultan of Kelantan in 1994, the state government said it was unable to enforce the laws as they contravened the constitution.

It is curious to note that while PAS leaders strongly maintain that these laws emanate from the Qur'an and hadith, and are therefore immutable and beyond question, the laws contained within the provisions of the *Hudud* enactments of these two states are not similar and have some fundamental differences. Even more surprising is that fact that Hadi Awang previously held the chair of the Kelantan *Hudud* drafting committee.

The *Hudud* Bill has been the continued focus of public debate in Malaysia. The Bill has come under criticism both on specific points as well as generally as being eager to inflict punishment and pain. This approach, although a necessary ingredient of a penal policy, needs to be moderated by such other influences that are felt to be equally important in the formulation of a comprehensive philosophy of punishment. To show care and compassion and to provide an opportunity for those who might be ready to repent and reform are among the considerations that have received greater attention in the formulation of a comprehensive penal policy in modern times. Apart from the essential merit of the harmonious approach, the added emphasis on rehabilitation and reform is an acknowledgement on the part of the society at large that crime is not a totally isolated phenomenon. The Qur'anic outlook on punishment may be characterized by its dual emphasis on retribution and reformation. It is my submission that the *Hudud* Bill in both Kelantan and Terengganu has failed to be reflective either of the balanced outlook of the Qur'an or of the social conditions and realities of contemporary Malaysian society.

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[44] Freedom of Religion, *Hudud* and Related Matters in Malaysia, pg.121.

[45] Malay moderates argue against the implementation of the Islamic law (inclusive of *Hudud*) for fear of grave injustices being committed especially on women. Most of them are Western educated. Since the day they were born, they have been living under the English system. They are used to seeing imprisonment as the way of punishment. They scorn upon corporal punishment and thought of it as being draconian. They live in a system that looks at the Syariah with condemning eyes. See Sisters in Islam "*Hudud* in Malaysia: The Issues at Stake", SIS Forum (Malaysia), Kuala Lumpur, 1995, pg.1.

The *Hudud* Bill gives rise to three types of problems, one of which is manifested in lack of jurisdiction leading to conflict with the Federal Constitution. Then there are problems relating to the realities of Malaysian society and politics. In the context of a multi-religious society, this Bill raises questions as to whether the nation should be governed by two sets of laws, one for Muslims, the other for non-Muslims? And then the fact that only two of the 13 states of Malaysia (Kelantan and Terengganu) has attempted to chart a different plan for itself has presented the national government with difficult choices. The other problem here is manifested in the fact that the Bill fails to offer a meaningful alternative as it raises questions over the wisdom of a literalist approach to the understanding of *Hudud*. The Bill exhibits no attempt to exercise *ijtihad* over new issues, such that would fulfil the ideals of justice and encourage the development of a judicious social policy.

Indeed, the Federal State power conflict over criminal law assumed new prominence with the passage of this *Hudud* Bill partly because of its overlap with the Penal Code. Some offences under the Bill are also federal law offences, giving rise to the issue of double jeopardy where both laws would be simultaneously enforceable. A person in that situation can seek protection against double jeopardy under Article 7 (2) of the Federal Constitution. There are also a number of offences such as theft, robbery, killing, rape, causing bodily harm, and unnatural offences which have been dealt with by the Penal Code, and there are provisions in this Code which relate to such other offences as false accusation of *zina*, consuming liquor and using words of contempt against religion.

In an attempt to overcome the problem the *Hudud* Bill has barred any proceedings or trial under the Penal Code of a person who has been tried for the same offence under this Bill (Clause 61). But then questions arise as to the acceptability of this formula and whether it can resolve the conflict which the *Hudud* Bill has given rise to in trial under the laws of another jurisdiction particularly when it is the former that is violating the limits of its jurisdiction under the Constitution.

The *Hudud* Bill also provided for a range of punishments that are far in excess of the limitations which Parliament has imposed on the jurisdiction of Syariah courts. The Syariah courts (Criminal Jurisdiction) Act 1965, as amended in 1984, restricted the jurisdiction of these courts only to Muslims who may be tried for offences punishable with imprisonment of up to three years or a fine of up to RM5,000 or with whipping not exceeding six strokes, or with any combination of these. The *Hudud* punishments that the Bill has proposed exceeds these limits, and it is doubtful whether the Special Syariah Courts that are envisaged in the Bill could lawfully exercise their functions unless the Federal Parliament suitably amends the provisions of the 1965 Act.[46]

As for the possibility that the *Hudud* Bill might be nullified if it were found to be in conflict with the Federal Constitution, the Deputy Menteri Besar of Kelantan announced, days before the ratification of the *Hudud* Bill in the State Assembly, that the Kelantan Government would have fulfilled its responsibilities in tabling and getting the State Legislative Assembly to pass the *Hudud* laws. It will then be up to the Federal Muslim leaders to prove their stand on the Islamic Syariah. He further pointed out that the State Government would not be able to enforce the proposed law unless certain provisions of the Federal Constitution were amended.[47]

The 1946 judgment of the Nuremberg Tribunal endorsed the notion of human rights as the foundation and legitimacy of international criminal procedure. There is a consensus that there is natural connection

[46] Mohammad Hashim Kamali, 'Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan, Malaysia', pg.207.
[47] Mohammad Hashim Kemali, 'Punishment in Islamic Law: A Critique of the *Hudud* Bill of Kelantan' Malaysia', pg. 207.

between human rights and international criminal law. Some Muslim countries are signatories to various treaties that outlaw international crimes and human rights violations.

The content of the Syariah law is very different from what is acceptable to the international community. If we consider the vital issue of universality of human rights and criminal law, then it is only wise for Islamic criminal law to conform to fundamental principles of international criminal law. The choice facing a modern Muslim, therefore, is either to insist on enforcing the totality of syariah regardless of standards of human rights, or to seek a radical reform within Islam that will reconcile the syariah with present-day human rights requirements and expectations.[48] A radical restructuring of traditional syariah law is advocated because it represented the needs and expectations of previous generations, and a new principle of syariah can be evolved in line with contemporary realities.

The punishments inflicted for *Hudud* crimes – flogging, stoning and amputation are retrogressive not only in Islam, but the entire humanity.[49] The punishment of stoning to death for adultery is not provided for in the Qur'an, and it is a gross violation of fundamental human rights of people. Various human rights instruments prohibit torture and other forms of cruel, barbaric and degrading punishment. *Hudud* punishments should not be prescribed for offences such as fornication, drinking of alcohol and apostasy.
It is completely unacceptable for Islamic criminal law to criminalise offences that are civil violations in international law. Civil liberties like freedom of thought, conscience and religion, and religious liberties are criminal offences punishable under *Hudud* crimes in Islam. Criminal procedure under Syariah does not allow cross-examination of witness, or rebuttal testimony by the accused. The rules of evidence in Islamic criminal law exclude all men who lack credibility, and integrity in society *(non-adl*). Women and non-Muslims are not allowed to testify. There is no provision for jury trial, or appeals.

Historically, we are aware of many committed Muslim scholars who advocated for the reform of Islam.[50] There is a consensus among a reasonable number of scholars that Islam should be divested of traditionalistic-legalistic and conservative interpretation. Perhaps the most negative consequences of dogmatic Islam is the manipulation of Islam for political purposes by totalitarian regimes which has culminated into socio-political instability and anarchy. Rethinking the syariah does not only mean the transposition of all the sources of Islamic jurisprudence from exegesis to hermeneutics, it also involves the deconstruction of classical Islamic thought. Critiques of classical Islamic traditionalism, such as Muhammad Arkoun, has advocated for the repudiation of the epistemological framework established by jurists in the 8th and 9th centuries.[51] Another protagonist of rethinking Islam is Abdullah An-Naim,[52] and

[48] Quoted in Lippman, 1989:55-56. Lippman's argument is that from the Islamic perspective, new reasoning (neo-itjihad) that calls for the restructuring of Islamic criminal law is contrary to the essence of Islam that bestows a duty on individuals to seek salvation through submission to Allah s.w.t. The syariah as path to salvation is sacrosanct. God has the right to demand obedience from His creatures. Islamic jurisprudence generally does not consider individual rights. What is paramount is God's right which is protected by the state. See Mathew Lippman, "*Islamic Criminal Law and Procedure: Religious Fundamentalism v Modern Law*", 12 B.C. Int'l & Comp. L. Rev. 29

[49] See Osita Ogbu, 2005, "Punishments in Islamic Criminal law as Antithetical to Human Dignity: The Nigerian Experience", *International Journal of Human Rights*, Vol.9, No.2, pg. 170-182.

[50] To resolve legal problems in modern life, Muslims need to reform Islamic law. The reformers were compelled to search for methods in which Islamic law could be interpreted, modified and applied to meet the needs of modern society.

[51] Muhammad Arkoun has given a scholarly leadership in the project of rethinking Islam, and consequently proposed that for Islam to move towards a modern critical analysis there must be the courage to bypass both the methodology of traditional Islam, and the orientalist historical-philological analysis. Muhammad Arkoun maintained that the fundamental and vital dimension of rethinking Islam is the redefinition of the Qur'an, hadith and all other sources of Islamic jurisprudence. He added that there is a need to recover the "*Quranic*" facts which is the original prophetic speech that formed the basis of divine revelation which Prophet Muhammad s.a.w received from God, and the *Quranic* fact must be distinguished from extrapolation, whereby the goal is to ensure the Quran exists with a dialectical revelation between the revealed text and historical exigency. Muhammad Arkoun also described as an unfortunate, and retrogressive for erudite Islamic scholars to ignore the philosophical critique of sacred text when such an approach could strengthen the scientific foundation of history of the *mushaf* and of the theology of the revelation.

the focus of his work is the reconstruction of Syariah to comply with international law and human rights and civil liberties. Abdullah An-Naim posits that the Syariah of the Islamists is not only problematic, but can be manipulated by the ruling elites to oppress the religious minorities and women. The syariah of the Islamists is a judicial blockade against religious freedom, freedom of speech and all civil liberties with an Islamic cloak. He stressed that "*the only way to reconcile these competing imperatives for change in the public law of Muslim countries is to develop a version of Islamic public law which is compatible with modern standards of constitutionalism, criminal justice, international law and human rights*".[53]

Coming back to criticism against *Hudud*, some went to the extent of saying that the implementation of *Hudud* would only bring greater human rights disaster as the punishment is very cruel, inhuman or degrading.[54] They argued that if people are exposed to *Hudud* punishments, they will gradually become inhumane.[55] It was further contended that the nature of *Hudud* punishment is outdated and therefore, does not fit right into our system of society today. It is submitted that the critique should not merely look at the harshness of the syariah punishment from the offender's point of view. They should also understand the psychological and emotional suffering of the victim or the dependents of the deceased. They should put themselves in the shoes of the victim or their family members who are grieving for the loss of their loved one in a brutal crime.

Finally, one issue that has received much attention is the impact of *Hudud* on non-Muslims.[56] Will they be subjected to *Hudud* laws? Even if they are not, will such laws apply to a non-Muslim who is an accomplice in a crime by a Muslim? Social media is rife with emotionally charged opinions. The pressure group, Ikatan Muslim Malaysia (ISMA or Muslim Fellowship of Malaysia), has questioned the citizenship status of non-Muslims who are unhappy with the *Hudud* laws. Senior clerics, like the former Mufti of Perlis, Dr. Asri Zainal Abidin, have taken the position that non-Muslims should be included. Social activists lament the injustice if a non-Muslim receives a lighter sentence under civil laws compared with a heavier one for the Muslim under *Hudud* laws for the same offence.

During times when emotions run high, it is helpful to listen to voices of reason. Many scholars on Islam have discussed *Hudud* in contemporary society, advocated rethinking on its implementation and suggested alternative ways at maintaining public order and security that conform to the spirit of Islam. [57]

See Muhammad Arkoun's comments in his book "The Unthought in Contemporary Islamic Thought", in Nar Abu Zayd (2006), "*Reformation of Islamic Thought: A Critical Historical Analysis*", Amsterdam, Amsterdam University Press, pg. 84.

[52] Abdullah an-Naim developed and propagated his teacher, Mahmud Muhammad Taha's doctrine on the "*Second Message of Islam*", which upholds the distinction between Meccan and Medinan version of the Quran and applied the concept of abrogation, where in event of conflict of law, the Meccan Quran could abrogate the Medinan corpus. Mahmud Muhammad Taha was convinced that the Meccan message that was "spiritualistic, accommodating justice, freedom and equality was replaced by the Medinan message emphasizing law, order and obedience. According to him, this was done because the Arabs were unable to appreciate the Meccan message in the context of 7th century Arabia. Mahmud Muhammad Taha further argued that there is a possibility to abrogate the Medinan Quran and restore the Meccan version, because the 7th century syariah is antithetical to the conscience of the 21st century. In developing the thoughts of his teacher, Abdullah An-Naim amplified the concept of the Meccan Quran. See Abdullah An-Naim (1990). *Towards an Islamic Reformation: Civil Liberties, Human Rights, and International Law*, Syracuse: University Press.

[53] See Abdullah An-Naim 1990:9.

[54] See 'Implementing *Hudud*: A Disaster in-waiting' at http://mole.my/content/implementing-hudud-disaster-waiting.

[55] Many people today objects to the amputating of hands for theft on the basis of cruelty of the punishment. However, they failed to understand the definition of "theft"; the philosophical dimension to such a ruling; and the circumstances justifying the execution of such punishment, among others.

[56] Non-Muslims are generally anxious. The issue of *Hudud* has profound impact on inter-religious relations. As a religiously diverse society, Malaysia's inter-faith harmony can be affected by the spill-over effects if the *Hudud* issue gives rise to gross misperceptions about Islam and becomes a wedge in relations between Muslims and non-Muslims in the country.

[57] See Mohammad Alami Musa's article '*Hudud* and Inter-Religious Relations', Rajaratnam School of International Studies (RSIS), Nanyang Technological University, Singapore, No. 103/2014.

Notwithstanding the mention of *Hudud* in the Holy Book, many stringent conditions must be met before punishment can be meted out. The demanding conditions that are practically near-impossible to fulfil, thus rendering the application of *Hudud* punishments virtually impracticable, or more preventive then punitive. The conditions are made onerous, as reflected in the Prophet Muhammad's s.a.w tradition to avoid *Hudud* punishments in case of doubt as to the facts, witnesses, victims or the accused.

Moreover, *Hudud* punishment cannot be applied on a criminal who repents after the crime and before its execution. In short, Muslims are enjoined to show tolerance as well as clemency; every time they show mercy and avoid the application of *Hudud* punishments, they are acting in the good spirit of Islam.

How then will public order and security be ensured if *Hudud* punishments are practically impossible to apply given the tough pre-conditions? Some scholars of Islam have argued that it is not against Islamic doctrine to rely on the system of punishments provided for under civil laws in lieu of *Hudud* punishments. These civil laws are indeed conforming to the spirit of Islamic laws or syariah because they dispense justice and re-affirm values as well as principles that are also held dear in Islam.[58]

There is always a concern that legal judgments made in the name of religion may be abused by an unjust government for reasons of expediency or by a harsh judiciary on the basis of arbitrary arrests or false witnesses. This is why renowned and learned scholars take the strong position that Muslims should only consider implementing *Hudud* laws if their societies consist of pious as well as honourable people and leaders of high moral integrity who do not abuse power so that political, social and economic justice prevails.

It is therefore judicious for Muslims and their leaders to focus on building a just and moral society governed by trustworthy leaders rather than treading the path of implementing *Hudud* laws without fulfilling the deliberately onerous preconditions, and violating the principle of justice found in the Qur'an. In trying to uphold the sacred religion of Islam,[59] we must be careful not to accept anything and everything that labels itself Islamic. We do not want Islam to be manipulated for the interest of an individual or a group to acquire power. In fact, there are cases where Islam is used to defend inequality, abuse of power, oppression of women and corruption on the part of the leaders. These are lessons to be learned so that what happened in other countries will not be repeated in this country. We do not want the image of Islam as a religion that emphasizes moderation, love and harmony in society tarnished as a result of harsh punishment imposed without taking into consideration the political and social environment of the contemporary Malaysian society.

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[58] Mohammad Alami Musa, '*Hudud* and Inter-Religious Relations',

[59] The implementation of Islamic law must not be considered solely from its implementation aspect, but how the law can solve the problems of the Malaysian contemporary society. If we can prove that Islamic law is able to solve the problems of our society, then we are able to project the truth about Islam as the religion to all times. On the other hand, if the implementation of the Islamic law results in more problems in our society because those who execute the law are weak and unjust, and its people ignorant, then Islam will be despised, and they will be held responsible for bringing disgrace to Islam.

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